DEPARTMENT OF LABOR

Employment Standards Administration, Wage and Hour Division

29 CFR Part 801

Application of the Employee Polygraph Protection Act of 1988

AGENCY: Wage and Hour Division, ESA, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: This document provides interim final regulations for the implementation of the Employee Polygraph Protection Act of 1988, which was signed into law June 27, 1988, and is effective December 27, 1988.

The purpose of the regulations is to provide protection for most private-sector employees from lie detector testing, either pre-employment or during the course of employment, with certain limited exceptions.

DATES: *Effective Date:* The interim final rule is effective December 27, 1988. Any covered employer, not otherwise exempt, who wishes to use a lie detector test after that date will be subject to this interim final rule.

Comments: Comments are due on or before February 27, 1989.

ADDRESSES: Submit written comments (preferably in triplicate) to Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210. Commenters who wish to receive notification of receipt of comments are requested to include a self-addressed stamped post card.

FOR FURTHER INFORMATION CONTACT: Paula V. Smith, Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue NW., Washington, DC 20210, (202) 523-8305. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

I. Background

On June 27, 1988, the Employee Polygraph Protection Act of 1988 (EPPA or the Act) was enacted into law. EPPA prohibits most private employers (Federal, State and local government employers are exempted from the Act) from using any lie detector tests either for pre-employment screening or during the course of employment. In addition, testing by the Federal Government of experts, consultants, or employees of Federal contractors engaged in national security intelligence or counterintelligence functions is permitted. The law contains several limited exemptions which authorize polygraph tests under certain conditions, including: (1) The testing of employees who are reasonably suspected of involvement in a workplace incident that results in economic loss or injury to the employer's business; (2) the testing of some prospective employees of private armored car, security alarm, and security guard firms; and (3) the testing of some current and prospective employees in firms authorized to manufacture, distribute, or dispense controlled substances. Employers who violate any of the Act's provisions may be assessed civil money penalties up to $10,000.

While the law provides for an effective date six months from the date of enactment, it also provides that the Secretary of Labor issue appropriate regulations "not later than 90 days after the date of enactment." Given the constraints of time and the statutory mandate to issue final regulations within 90 days of enactment, the Department of Labor is publishing this final rule on an interim basis, simultaneously inviting comments from interested parties. After review of the comments, the Department will either issue a proposal or a final regulation, based on the comments received.

II. Paperwork Reduction Act

Recordkeeping requirements contained in the regulation (§ 801.30) are being submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) for review.

Public reporting burden for this collection of information is estimated to average as follows: 1. (A) Written Notice to Examinee of Polygraph Testing—5 minutes per response; (B) Additional Information in Notice to Examinee of Polygraph Testing for Ongoing Investigations—½ hour per response; 2. Written Notice to Polygraph Examiner Identifying Persons to be Examined—5 minutes per response; 3. Written Notice of Test Results to Examinee Prior to Adverse Action—1 minute per response; 4. Record of number of tests conducted daily and length of each test—½ minute per response; 5. Maintenance of test record—1 minute per response; (see 29 CFR 801.30), including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Information Management, U.S. Department of Labor, Room N-1301, 200 Constitution Avenue NW., Washington, DC 20210; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

III. Summary of Rule

The regulations in this Part are divided into six subparts. Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use and the posting of notices. Subpart A also sets forth interpretations regarding the effect of section 10 of the Act on other laws or collective bargaining agreements. Subpart B sets forth rules regarding the statutory exemptions from application of the Act. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the recordkeeping requirements and the rules on disclosure of polygraph test information. Subpart E deals with the authority of the Secretary of Labor and the enforcement provisions under the Act. Subpart F contains the procedures and rules of practice necessary for the administrative enforcement of the Act.

The Department met informally with outside parties who provided background information with respect to the preparation of this rule. Included in such meetings were representatives of security service companies and related trade associations; representatives of retail trade associations; representatives of the polygraph industry; and representatives of trade associations involved with controlled substances. Meetings were also held with officials of the Drug Enforcement Administration and the Department of Defense.

In developing this rule, a number of issues have been identified and explored. The Department has tentatively resolved these issues as described below, and it particularly invites comments on the following issues:

(1) The legislative intent as to the scope of the security service industry exemption is not entirely clear on the treatment of employees hired to install alarms in or guard commercial or retail establishments and residences. We have tentatively concluded that the section 7(e)(1)(B) exemption does not apply to security guard or security alarm firms protecting private homes or businesses not primarily engaged in the handling,

trading, transferring, or storing of the assets enumerated in the statute. There is an argument, however, that the exemption should be interpreted more broadly, so as to include such employees. If the exemption were so interpreted, it appears that virtually all employees in this industry would be subject to pre-employment polygraph tests. Such an interpretation is not easily reconciled with the language of the statute itself, which identifies specific types of security work as included within the exemption. Comment is specifically invited on the scope of the exemption as provided in § 801.14.

(2) The Congress specifically directed the Department to develop regulations which would list the types of "facilities, materials, or operations" having a significant impact on the health or safety of any State or political subdivision or the national security. It is evident the legislative intent was to protect the safety and health of the general public. The Department has listed a number of such "facilities, materials, or operations" in § 801.14(i). Comments are specifically requested on the scope of this list.

(3) The rule broadly interprets the term "prospective employee" for purposes of the security service and controlled substance exemptions. In particular, current employees of the employer, who were initially hired to perform duties which do not fall within the scope of the exemptions (and who, therefore, are not subject to pre-employment polygraph tests), could be tested as "prospective employees" the first time (only) they are re-assigned or promoted to a position with duties that do fall within the scope of the exemptions. We have found no pertinent legislative history on this issue. We believe, however, that some latitude is necessary in the definition of "prospective employee" for purposes of the exemption, so that current employees of an employer will not be unfairly disadvantaged, with respect to non-employees, in competition for positions which may be subject to the exemption. We believe that this construction, contained in §§ 801.13(d) and 801.14(b), is reasonable, given the realities of the workplace.

(4) Except as noted above, the rule makes no allowances for pre-employment testing to be conducted after an applicant is initially hired by an employer. It has been suggested that there are situations in which it is not feasible or practical to conduct the test prior to the actual hiring date and that it would be consistent with the purposes of the Act to permit testing subsequent to hiring in some circumstances. Comment is invited on the question whether it would be consistent with the Act to permit such testing. If so, under what circumstances, and what would be a reasonable period (e.g., one day, one week, one month) subsequent to hiring in which such testing should be permitted?

(5) The rule interprets the terms "direct access" and "access" differently for purposes of the controlled substance exemption (§ 801.13). This, "direct access", which is one of the elements necessary for pre-employment testing, is more narrowly defined than "access", an element required for testing of current employees during an ongoing investigation. In the latter case, however, the "access" must be to the specific person or property that is the subject of the investigation. The Department believes this interpretation is consistent with the statute and legislative history.

(6) The legislative history of the Act indicates Congress' intention that the controlled substance exemption not be applicable to truck drivers and that the exemption extend only to persons or entities registered with the Drug Enforcement Administration. The Controlled Substances Act exempts from registration requirements comon or contract carriers and warehouses whose possession of a controlled substance is in the usual course of their business. Accordingly, § 801.13(b)(2) excludes employees of common or contract carriers or public warehouses from this exemption.

(7) Inventory shortages are common throughout many industries. Section 801.12 is intended to preclude the mere existence of an inventory shortage, in and of itself, from being a basis for testing of current employees since it does not meet the specific incident requirement of the exemption. Are the safeguards in the rule sufficient to prevent the random testing of employees, or classes of employees, on a routine or regular basis?

(8) The Act provides several examples of events which would constitute an economic loss or injury for purposes of the ongoing investigation exemption, including theft, embezzlement, and sabotage. Section 801.12 adds other examples, including check-kiting and money-laundering, which were contained in the legislative history. Comment is invited on the question whether there are other examples, or other classes of activity, which should be included in the scope of "economic loss" for purposes of this exemption.

(9) Section 801.14 defines the statutory term "primary business purpose" to mean the activity from which 50 percent or more of the employer's business income is derived. Thus, at least 50 percent of an employer's annual dollar volume of business must be derived from the types of security activities within the scope of the exemption in order for the exemption to apply. Would some alternative definition of "primary business purpose" better effectuate the statutory scheme, or be more workable?

(10) The Act requires that individuals must be given "reasonable written notice" of the date, time, location and other information about a polygraph test. Sections 801.12(g)(2) and 801(c)(1)(A) define "reasonable" as at least 48 hours prior to the examination. Should some other minimum time frame be used to define "reasonable", and if so, why?

Executive Order 12291

This rule is not classified as a "major rule" under Executive Order 12291 on Federal Regulations, because it is not likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign enterprises in domesic or export markets. Therefore no regulatory impact analysis is required.

The Department's determination that the regulation is not subject to a regulatory impact analysis is based on the following:

(a) The Congressional Budget Office estimated the cost for EPPA to be $1 million to the Federal Government and that EPPA will have no impact on State and local governments.

(b) Further, the legislative history on EPPA shows a lack of any evidence that internal theft rates are higher in States which prohibit the use of polygraph tests. Also, there are no conclusive studies which show that polygraph testing reduces employee crime.

(c) Section 7 of EPPA permits certain employers to continue to conduct polygraph testing and permits all employers to request an employee to take a test, under certain conditions, when it is administered as part of an ongoing investigation. Consequently, any economic costs due to increased theft attributable to the absence of polygraph testing will be minimized.

(d) The net employment effect of EPPA will not be significant. As

employers turn to different hiring procedures and screening techniques, employment gains in the occupations associated with these alternative hiring procedures will offset any employment loss in the polygraph testing field.

Preliminary Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 requires agencies to prepare regulatory flexibility analyses, and to develop alternatives whenever possible, in drafting regulations that will have "a significant economic impact on a substantial number of small entities." The following analysis assesses the impact of these regulations on small entities required by the Act.

(1) Reasons Why Action by Agency Is Being Considered

On June 27, 1988 the Employee Polygraph Protection Act of 1988 was enacted into law. This Act, which is effective December 27, 1988, generally prevents employers engaged in interstate commerce from using any lie detector tests, with certain exemptions, either for pre-employment screening or during the course of employment. Section 5 of the Act requires the Secretary of Labor to promulgate such rules and regulations as may be necessary to carry out the Act. This interim final rule is being issued to implement the Act.

(2) Objectives of and Legal Basis for Rule

This interim final rule is issued pursuant to section 5 of the Employee Polygraph Protection Act of 1988. Its objective is to enable employers and polygraph examiners to comply with the requirements of the Act, and to advise employees and job applicants of the protections afforded by the Act.

(3) Number of Small Entities Covered Under Rule

This interim final rule is applicable to all private sector employers engaged in or affecting "commerce" or in the production of goods for "commerce". The scope of the term "commerce" is accorded the same meaning as provided by section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)). Approximately 6.5 million employers are covered by these regulations, and the majority of such employers would be classified as small entities. In addition, these regulations contain provisions applying to over 3,500 polygraph examiners and an undetermined number of others who administer lie detector-type tests, most of which are prohibited by the Act. It is estimated that nearly all of these examiners are either individual practitioners or associated with firms that would be classified as small entities.

(4) Reporting, Recordkeeping and Other Compliance Requirements of the Rule

The interim final rule establishes recordkeeping requirements for employers with respect to the maintenance and preservation of records for each polygraph test administered, as well as for each polygraph examiner who administers such tests on behalf of employers.

(5) Relevant Federal Rules Duplicating, Overlapping or Conflicting With the Rule

There is no duplication of existing Wage-Hour requirements, nor is similar information required by any other Federal agency or statute.

(6) Differing Compliance and Recordkeeping Requirements

The language sets forth in this interim final regulation closely adheres to the requirements imposed by the language of the Act and accompanying legislative history. The burdens imposed by these requirements on employers, and the polygraph examiners used by employers, are those imposed by statute, and those necessary to enforce the statute.

However, in developing this interim final rule, consideration was given to requiring a standard form for written statements which employers must provide to examinees, in certain instances, as a condition for administering polygraph tests under the several exemptions to the Act's general prohibition of such tests. For example, an employer is required to furnish an employee with a written statement setting the employee's rights under the law, prior to administering a polygraph test. It was concluded that employers, especially small entities, should have the flexibility to formulate and maintain such required written statements in any order or form deemed most appropriate to their needs, and that standard formats would not be required. However, to assist such employers, a sample format is set forth in the Appendix to this Part.

(7) Clarification, Consolidation and Simplification of Compliance and Reporting Requirements

As noted above, the recordkeeping requirements in this interim final rule are those imposed by statute, and those necessary to determine compliance with the Act. Employers are permitted to use any format that meets enforcement and compliance needs.

(8) Use of Other Standards

Appropriate alternative standards that would impose fewer regulatory burdens on covered employers, especially small entities, are not available.

(9) Exemptions of Small Entities from Coverage of the Rule

An exemption from the requirements of the interim final rule for small entities is not permitted by the provisions of the Act.

Publication as an Interim Final Rule

Request for Comments

The Secretary has determined that the public interest requires the immediate issuance of these interim final regulations in order to comply with the statutory requirement that regulations be issued well in advance of the effective date of the Act. Insufficient time existed since the enactment of the EPPA for the Department to issue an in-depth proposal for comments, review the comments, and promulgate a final rule in the time provided by the Act.

The failure to have this rule in place substantially in advance of the effective date of the Act (December 27, 1988) would lead to unnecessary, unwarranted and potentially costly uncertainty on the part of affected employers, employees, job applicants, and polygraph examiners, concerning the scope of the statutory coverage and of the exemptions thereunder and concerning their rights and obligations under the Act.

Accordingly, the Secretary finds good cause, pursuant to 5 U.S.C. 553(b)(3)(B), that prior notice and public comment are impracticable and contrary to the public interest. However, interested persons are invited to submit comments on this regulation by February 27, 1989. Following evaluation of the comments received, a proposed rule or a final regulation, modified as necessary, will be published.

This document was prepared under the direction and control of Paula V. Smith, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 801

Employment, Investigations, Labor, Law enforcement.

Signed at Washington, DC, on this 18th day of October 1988.

Ann McLaughlin,

Secretary of Labor.

Fred W. Alvarez,

Assistant Secretary for Employment Standards.

Paula V. Smith,

Administrator, Wage and Hour Division.

Accordingly, Title 29, Chapter V, of the Code of Federal Regulations is amended by adding a new Subchapter C consisting of Part 801 to read as follows.

SUBCHAPTER C—OTHER LAWS

PART 801—APPLICATION OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

Subpart A—General

Subpart B—Exemptions

Subpart C—Restrictions on Polygraph Usage Under Exemptions

Subpart D—Recordkeeping and Disclosure Requirements

Subpart E—Enforcement

Subpart F—Administrative Proceedings

General

Procedures Relating to Hearing

Rules of Practice

Referral for Hearing

Procedures Before Administrative Law Judge

Modification or Vacation of Decision and Order of Administrative Law Judge

Record

Appendix A—Notice to examine

Authority: Pub. L. 100-347, 102 Stat. 646, 29 U.S.C. 2001-2009.

Subpart A—General

§ 801.1 Purpose and scope.

(a) Effective December 27, 1988, the Employee Polygraph Protection Act of 1988 (EPPA or the Act) prohibits most private employers (Federal, State, and local government employers are exempted from the Act) from using any lie detector tests either for pre-employment screening or during the course of employment. Polygraph tests, but no other types of lie detector tests, are permitted under limited circumstances subject to certain restrictions. The purpose of this part is to set forth the regulations to carry out the provisions of EPPA.

(b) The regulations in this part are divided into six subparts. Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use and the posting of notices. Subpart A also sets forth interpretations regarding the effect of section 10 of the Act on other laws or collective bargaining agreements. Subpart B sets forth rules regarding the statutory exemptions from application of the Act. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the recordkeeping requirements and the rules on the disclosure of polygraph test information. Subpart E deals with the authority of the Secretary of Labor and the enforcement provisions under the Act. Subpart F contains the procedures and rules of practice necessary for the administrative enforcement of the Act.

§ 801.2 Definitions.

For purposes of this part:

(a) "Act" or "EPPA" means the Employee Polygraph Protection Act of 1988 (Pub. L. 100-347, 102 Stat. 646, 29 U.S.C. 2001-2009).

(b) (1) The term "commerce" has the meaning provided in section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)). As so defined, "commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(2) The term "State" means any of the fifty States and the District of Columbia and any Territory or possession of the United States.

(c) The term "employer" means any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee. A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an "employer" with respect to the examinees.

(d) (1) The term "lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(2) The term "lie detector" does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Also not included in the definition of "lie detector" are written or oral tests commonly referred to as "honesty" or "paper and pencil" tests, machine-scored or otherwise.

(e) The term "polygraph" means an instrument that—

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) Is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(f) The terms "manufacture", "dispense", "distribute", and "deliver" have the meanings set forth in the Controlled Substances Act, 21 U.S.C. 802.

(g) The term "Secretary" means the Secretary of Labor or authorized representative.

(h) "Employment Standards Administration" means the agency within the Department of Labor, which includes the Wage and Hour Division.

(i) "Wage and Hour Division" means the organizational unit in the Employment Standards Administration of the Department of Labor to which is assigned primary responsibility for enforcement and administration of the Act.

(j) "Administrator" means the Administrator of the Wage and Hour Division, or authorized representative.

§ 801.3 Coverage.

Any employer engaged in or affecting commerce or in the production of goods for commerce is subject to the provisions of the Act, unless otherwise exempt pursuant to section 7 of the Act and §§ 801.10 through 801.14 of this part.

§ 801.4 Prohibitions on lie detector use.

Section 3 of EPPA provides that, unless otherwise exempt pursuant to section 7 of the Act and §§ 801.10 through 801.14 of this part, covered employers are prohibited from:

(a) Requiring, requesting, suggesting or causing, directly or indirectly, any employee or prospective employee to take or submit to a lie detector test;

(b) Using, accepting, or inquiring about the results of a lie detector test of any employee or prospective employee; and

(c) Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any employee or prospective employee to take such action for refusal or failure to take or submit to such test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding, or for exercising any rights afforded by the Act.

§ 801.5 Effect on other laws or agreements.

(a) Section 10 of EPPA provides that the Act, except for subsections (a), (b), and (c) of section 7, does not preempt any provision of a State or local law, or any provision of a collective bargaining agreement, that prohibits lie detector tests or is more restrictive with respect to the use of lie detector tests.

(b) (1) This provision applies to all aspects of the use of lie detector tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employers.

(2) For example, if the State prohibits the use of polygraphs in all private employment, polygraph examinations could not be conducted pursuant to the limited exemptions provided in the Act; a collective bargaining agreement that provides greater protection to an examinee would apply in addition to the protection provided in the Act; or more stringent licensing or bonding requirements in a State law would apply in addition to the Federal bonding requirement.

(3) On the other hand, industry exemptions and applicable restrictions thereon, provided in EPPA, would preempt less restrictive exemptions established by State law for the same industry, e.g., random testing of current employees in the drug industry not prohibited by State law but limited by this Act to tests administered in connection with ongoing investigations.

(c) EPPA does not impede the ability of State and local governments to enforce existing statutes or to enact subsequent legislation restricting the use of lie detectors with respect to public employees.

(d) Nothing in section 10 of the Act restricts or prohibits the Federal Government from administering polygraph tests to its own employees or to experts, consultants, or employees of contractors, as provided in subsections 7(b) and 7(c) of the Act, and § 801.11 of this part.

§ 801.6 Notice of protection.

Every employer subject to EPPA shall post and keep posted on its premises a notice explaining the Act, as prescribed by the Secretary. Such notice must be posted in a prominent and conspicuous place in every establishment of the employer where it can readily be observed by employees and applicants for employment. Copies of such notice may be obtained from local offices of the Wage and Hour Division.

§ 801.7 Authority of the Secretary.

(a) Pursuant to section 5 of the Act, the Secretary is authorized to:

(1) Issue such rules and regulations as may be necessary or appropriate to carry out the Act;

(2) Cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of the Act; and

(3) Make investigations and inspections as necessary or appropriate, through complaint or otherwise, including inspection of such records (and copying or transcription thereof), questioning of such persons, and gathering such information as deemed necessary to determine compliance with the Act or these regulations; and

(4) Require the keeping of records necessary or appropriate for the administration of the Act.

(b) Section 5 of the Act also grants the Secretary authority to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with any investigation or hearing under the Act. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any investigation or hearing provided for in the Act, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary.

(c) In case of disobedience to a subpoena, the Secretary may invoke the aid of a United States District Court which is authorized to issue an order requiring the person to obey such subpoena.

(d) Any person may report a violation of the Act or these regulations to the Secretary by advising any local office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or any authorized representative of the Administrator. The office or person receiving such a report shall refer it to the appropriate office of the Wage and Hour Division, Employment Standards Administration, for the region or area in which the reported violation is alleged to have occurred.

(e) The Secretary shall conduct investigations in a manner which, to the extent practicable, protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

(f) It is a violation of these regulations for any person to resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection, or law enforcement function pursuant to the Act during the performance of such duties.

Subpart B—Exemptions

§ 801.10 Exclusion for public sector employers.

(a) Section 7(a) provides an exclusion from the Act's coverage for the United

States Government, any State or local government, or any political subdivision of a State or local government, acting in the capacity of an employer. This exclusion from the Act also extends to any interstate governmental agency.

(b) The term "United States Government" means any agency or instrumentality, civilian or military, of the executive, legislative, or judicial branches of the Federal Government, and includes independent agencies, wholly-owned government corporations, and nonapprporiated fund instrumentalities.

(c) This exclusion from the Act applies only to the Federal, State, and local government entity. It does not extend to contractors or nongovernmental agents of a government entity.

§ 801.11 Exemption for national defense and security.

(a) The Exemptions allowing for the administration of polygraph tests in the following paragraphs (b) through (e) of this section apply only to the Federal Government; they do not allow private employers/contractors to administer such test.

(b) Section 7(b)(1) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any expert, consultant or employee of any contractor to the Department of Defense; or the Department of Energy, in connection with the atomic energy defense activities of such Department.

(c) Section 7(b)(2)(A) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function of the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency, to any individual employed by, asigned to, or detailed to any such agency; or any expert or consultant under contract to any such agency; or any individual applying for a position in any such agency; or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency.

(d) Section 7(b)(2)(B) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function, to any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2 (a) of Executive Order 12356 (or a successor Executive Order).

(e) Section 7(c) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under a contract with the Bureau.

(f) "Counterintelligence" for purposes of the above paragraphs means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, terrorist activities, or assassinations conducted for or on behalf of foreign governments, or foreign or domestic organizations or persons.

(g) Lie detector tests of persons described in the above paragraphs shall be administered in accordance with applicable Deparment of Defense directives and regulations, or other regulations and directives governing the use of such tests by the United States Government, as applicable.

§ 810.12 Exemption for employers conducting investigations of economic loss or injury.

(a) Section 7(d) of the Act provides a limited exemption from the general prohibition on lie detector use in private employment settings for employers conducting ongoing investigations of economic loss or injury to the employer's business. An employer may request an employee, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.20, 801.22, 801.23, and 801.35 of this part, to submit to a polygraph test, but no other type of lie detector test, only if—

(1) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation or an act of industrial espionage or sabotage;

(2) The employee has access to the property that is the subject of the investigation;

(3) The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation;

(4) The employer provides the examinee with a statement, in a language understood by the examinee, prior to the test which fully explains with particularity the specific incident or activity being investigated and the basis for testing particular employees and which contains, at a minimum:

(i) An identification with particularity of the specific economic loss or injury to the business of the employer;

(ii) A statement specifically describing the employee's access to the property that is the subject of the investigation;

(iii) A statement describing in detail the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(iv) Signature of a person (other than a polygraph examiner) authorized to legally bind the employer; and

(5) The employer retains a copy of the statement described in paragraph (a)(4) of this section for at least 3 years and makes it available for inspection by the Wage and Hour Division on request. (See § 801.30(a).)

(b) For the exemption to apply, the condition of an "ongoing investigation" must be met. As used in section 7(d) of the Act, the ongoing investigation must be of a specific incident or activity. Thus, for example, an employer may not request that an employee or employees submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Such random testing by an employer is specifically precluded by the Act. Further, by limiting the exemption to a specific incident or activity, an employer is precluded from using the exemption in situations where the so-called "ongoing investigation" is continuous. For example, the fact that items in inventory are frequently missing from a warehouse would not be a sufficient basis for administering a polygraph test. Even if the employer can establish that unusually high amounts of inventory are missing from the warehouse in a given month, this, in and of itself, would not be sufficient basis to meet the specific incident requirement without evidence of intentional wrongdoing. Administering a polygraph test in such circumstances, without identification of a specific incident or activity and a "reasonable suspicion that the employee was involved" would amount to little more than a fishing expedition.

(c) (1) The term "economic loss or injury to the employer's business" includes losses or injuries resulting from theft, embezzlement, misappropriation, industrial espionage or sabotage. These examples, cited in the Act, are intended to be illustrative and not exhaustive. Other specific incidents which would

meet the economic loss or injury requirement include check-kiting, money laundering, or the misappropriation of confidential or trade secret information. Similarly, instances such as theft from property managed by an employer, or property held by an employer as a fiduciary or custodian, would meet the required injury standard.

(2) The eonomic loss must result from intentional wrongdoing. Thus, losses which would not serve as a basis for the administration of a polygraph test include those apparently unintentional losses stemming from a truck, car, workplace or other similar type accidents. Any economic loss incident to lawful union or employee activity also would not satisfy this requirement.

(3) It is the business of the employer which must suffer the economic loss or injury. Thus, a theft committed by one employee against another employee of the same employer would not satisfy the requirement.

(d) While nothing in the Act prohibits the use of medical tests to determine the presence of controlled substances or alcohol in bodily fluids, the section 7(d) exemption does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employer (e.g., an accident involving a company vehicle).

(e) Section 7(d)(2) provides that, as a condition for the use of the exemption, the employee must have had access to the property that is the subject of the investigation.

(1) The word "access", as used in section 7(d)(2), refers to the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation.

The term "access", thus, includes more than direct or physical contact during the course of employment. For example, all employees working in or with authority to enter a warehouse storage area have "access" to the property in the warehouse. All employees with the combination to a safe have "access" to the property in a locked safe. Employees also have "access" who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employer's inventory records. In such a situation, it is clear that the bookkeeper effectively has "access" to the property that is the subject of the investigation.

(2) As used in section 7(d)(2), "property" refers to specifically identifiable property, but also includes such things of value as security codes and computer data, and proprietary financial or technical information which by its availability to competitors or others would cause economic harm to the employer.

(f)(1) As used in section 7(d)(3), the term "reasonable suspicion" refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. Thus, for example, access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for "reasonable suspicion". Information from a co-worker, or an employee's behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature) may constitute a factor in determining whether there is a reasonable suspicion.

(2) For example, in an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment's safe no earlier than 9:00 a.m., in order to place the jewelry in a window display case, is observed opening the safe at 7:30 a.m. In such a situation, the opening of the safe by the employee one and one-half hours prior to the specified time may serve as the basis for reasonable suspicion. On the other hand, in the example given, if the employer asked the employee to bring the piece of jewelry to his or her office at 7:30, and the employee then opened the safe and reported the jewelry missing, such access, standing alone, would not constitute a basis for reasonable suspicion that the employee was involved in the incident.

(3) The employer has the burden of establishing that the specific individual or individuals to be tested are "reasonably suspected" of involvement in the specific economic loss or injury for the requirement in section 7(d)(3) to be met.

(g)(1) As discussed in paragraph (a)(4) of this section, section 7(d)(4) of the Act sets forth what information, at a minimum, must be provided to an employee if the employer wishes to claim the exemption.

(2) The statement required under paragraph (a)(4) of this section must be received by the employee at least 48 hours prior to the time of the examination. This will provide the employee with adequate pre-test notice of the specific incident or activity being investigated and afford the employee sufficient time prior to the test to obtain and consult with legal counsel or an employee representative.

(3) The statement to be provided to the employee must set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. However, section 7(d)(4)(A) requires specificity beyond the mere assertion of general statements regarding economic loss, employee access, and reasonable suspicion. For example, an employer's assertion that an expensive watch was stolen, and that the employee had access to the watch and is therefore a suspect, would not meet the "with particularity" criterion. If the basis for an employer's requesting an employee (or employees) to take a polygraph test cannot be articulated, and reduced to writing, then the standard would not be met. The identity of a co-worker or other individual providing information used to establish reasonable suspicion need not be revealed in the statement.

(4) It is further required that the statement provided to the examinee be signed by a person authorized to legally bind the employer. The standard would not be met if the person signing the statement is not authorized to legally bind the employer, and accordingly the exemption would not apply in such a case.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.20, 801.22, 801.23, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see Subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

§ 801.13 Exemption for employers authorized to manufacture, distribute, or dispense controlled substances.

(a) Section 7(f) provides an exemption from the Act's general prohibition regarding the use of polygraph tests for employers authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 202 of the Controlled Substances Act (21 U.S.C. 812). This exemption permits the administration of polygraph tests, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, and 801.35 of this part, to:

(1) A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(2) A current employee if the following conditions are met:

(i) The test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer; and

(ii) The employee had access to the person or property that is the subject of the investigation.

(b)(1) The terms "manufacture", "distribute", "distribution", "dispense", "storage", and "sale", for the purposes of this exemption, are construed within the meaning of the Controlled Substances Act (21 U.S.C. 801 *et seq.*), as administered by the Drug Enforcement Administration (DEA), U.S. Department of Justice.

(2) The exemption in section 7(f) of the Act applies only to employers who are authorized by DEA to manufacture, distribute, or dispense a controlled substance. Section 302 of the Controlled Substances Act (21 U.S.C. 822) requires every person who manufactures, distributes, or dispenses any controlled substance to register with the Attorney General (i.e., with DEA). Common or contract carriers and warehouses whose possession of the controlled substance is in the usual course of their business or employment are not required to register. Since this exemption is intended to apply only to employees and prospective employees of persons or entities registered with DEA, and is not intended to apply to truck drivers employed by persons or entities who are not so registered, it has no application to employees of common or contract carriers or public warehouses. Truck drivers and warehouse employees of the persons or entities registered with DEA and authorized to manufacture, distribute, or dispense controlled substances, are within the scope of the exemption where they have direct access or access to the controlled substances, as discussed below.

(c) In order for a polygraph examination to be performed, section 7(f) of the Act requires that a prospective employee have "direct access" to the controlled substance(s) manufactured, dispensed, or distributed by the employer. Where a current employee is to be tested as a part of an ongoing investigation, section 7(f) requires that the employee have "access" to the person or property that is the subject of the investigation.

(1) A propective employee would have "direct access" if the position being applied for has responsibilities which include contact with or which affect the disposition of a controlled substance, including participation in the process of obtaining, dispensing, or otherwise distributing a controlled substance. This includes contact or direct involvement in the manufacture, storage, testing, distribution, sale or dispensing of a controlled substance and may include, for example, packaging, repackaging, ordering, licensing, shipping, receiving, taking inventory, providing security, prescribing, and handling of a controlled substance. A prospective employee would have "direct access" if the described job duties would give such person access to the products in question, whether such employee would be in physical proximity to controlled substances or engaged in activity which would permit the employee to divert such substances to his or her possession.

(2) A current employee would have "access" within the meaning of section 7(f) if the employee had access to the specific person or property which is the subject of the on-going investigation, as discussed in § 801.12(e) of this part. Thus, to test a current employee, the employee need not have had "direct" access to the controlled substance, but may have had only infrequent, random, or opportunistic access. Such access would be sufficient to test the employee if the employee could have caused, or could have aided or abetted in causing, the loss of the specific property which is the subject of the investigation. In addition, a maintenance worker in a drug warehouse, whose job duties include the cleaning of areas where the controlled substances which are the subject of the investigation were present, but whose job duties do not include the handling of controlled substances, would be deemed to have "access", but normally not "direct access", to the controlled substances. On the other hand, a drug warehouse truck loader, whose job duties include the handling of outgoing shipment orders which contain controlled substances, would have "direct access" to such controlled substances. A pharmacy department in a supermarket is another common situtation which is useful in illustrating the distinction between "direct access" and "access". Store personnel receiving pharmaceutical orders, i.e., the pharmacist, pharmacy intern, and other such employees working in the pharmacy department, would ordinarily have "direct access" to controlled substances. Other store personnel whose job duties and responsibilities do not include the handling of controlled substances but who had occasion to enter the pharmacy department where the controlled substances which are the subject of the investigation were stored, such as maintenance personnel or pharmacy cashiers, would have "access". Certain other store personnel whose job duties do not permit or require entrance into the pharmacy department for any reason, such as produce or meat clerks, checkout cashiers, or baggers, would not ordinarily have "access" of any type. In the case of "direct access", the prospective employee's access to controlled substances would be as a part of the manufacturing, dispensing or distribution process, while a current employee's "access" to the controlled substances which are the subject of the investigation need only be opportunistic.

(d) The term "prospective employee", for the purposes of this section, includes a current employee who presently holds a position which does not entail direct access to controlled substances, and therefore is outside the scope of the exemption's provisions for preemployment polygraph testing, provided the employee has applied for and is being considered for transfer or promotion to another position which entails such direct access. For example, an office secretary may apply for promotion to a position in the vault or cage areas of a drug warehouse, where controlled substances are kept. In such a situation, the current employee would be deemed a "prospective employee" for the purposes of this exemption, and thus would be subject to preemployment polygraph screening, at the time of such a change in position. However, any adverse action which is based in part on a polygraph test against a current employee who is treated as a "prospective employee" may be taken only with respect to the prospective position and may not affect the

employee's employment in the current position.

(e) Section 7(f) of the Act makes no specific reference to a requirement that employers provide current employees with a written statement prior to polygraph testing. Thus, employers to whom this exemption is available are not required to furnish a written statement such as that specified in section 7(d) of the Act and § 801.12(a)(4) of this part.

(f) For the section 7(f) exemption to apply, the polygraph testing of current employees must be administered "in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer * * *".

(1) Current employees may only be administered polygraph tests in connection with an ongoing investigation, relating to a specific incident or activity, or potential incident or activity, as discussed in § 801.12(b) of this part. Thus an employer is precluded from using the exemption in connection with continuing investigations or on a random basis to determine if thefts are occurring.

(2) In addition, the test must be administered in connection with loss or injury, or potential loss or injury, to the manufacture, distribution, or dispensing of a controlled substance.

(i) Retail drugstores and wholesale drug warehouses typically carry inventory of so-called health and beauty aids, cosmetics, over-the-counter drugs, and a variety of other similar products, in addition to their product lines of controlled drugs. The noncontrolled products usually constitute the majority of such firms' sales volumes. An economic loss or injury related to such noncontrolled substances would not constitute a basis of applicability of the section 7(f) exemption. For example, an investigation into the theft of a gross of cosmetic products could not be a basis for polygraph testing under section 7(f), but the theft of a container of valium could be.

(ii) Polygraph testing, with respect to an ongoing investigation concerning products other than controlled substances might be initiated under section 7(d) of the Act and § 801.12 of this part. However, the exemption in section 7(f) of the Act and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see Subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

§ 801.14 Exemption for employers providing security services.

(a) Section 7(e) of the Act provides an exemption from the general prohibition against polygraph tests for certain armored car, security alarm, and security guard employers. Subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, and 801.35 of this part, section 7(e) permits the use of polygraph tests on prospective employees provided that such employers have as their primary business purpose the providing of armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel; and provided the prospective employees are being hired to protect:

(1) Facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, such as—

(i) Facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) Public water supply facilities,

(iii) Shipments or storage of radioactive or other toxic waste materials, and

(iv) Public transportation; or

(2) Currency, negotiable securities, precious commodities or instruments, or proprietary information.

(b)(1) Section 7(e) permits the administration of polygraph tests only to prospective employees. However, security service employers may administer polygraph tests to current employees in connection with an ongoing investigation, subject to the conditions of section 7(d) of the Act and § 801.12 of this part.

(2) The term "prospective employee" generally refers to an individual who is being considered for employment, for the first time, by an employer. However, the term "prospective employee" also includes current employees under circumstances similar to those discussed in paragraph (d) of § 801.13 of this part. Thus, for example, a security guard may be hired for a job outside the scope of the exemption's provisions for pre-employment polygraph testing, such as a position at a supermarket. If subsequently this guard is transferred or promoted to a job at a nuclear power plant, this currently-employed individual would be considered to be a "prospective employee" for purposes of this exemption, at the time of such proposed transfer or promotion. However, any adverse action which is based in part on a polygraph test against a current employee who is treated as a "prospective employee" may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(c) Section 7(e) applies to any private employer whose "primary business purpose" consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel. Thus, the exemption is limited to firms primarily in the business of *providing* such security services to others. (For example, a utility company which employs its own security personnel could not qualify.) In the case of diversified firms, the term "primary business purpose" shall mean that at least 50% of the employer's annual dollar volume of business is derived from the provision of the types of security services specifically identified in section 7(e).

(d)(1) As used in section 7(e)(1)(A), the terms "facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States" include protection of electric or nuclear power plants, public water supply facilities, radioactive or other toxic waste shipments or storage, and public transportation. These examples are intended to be illustrative, and not exhaustive. However, the types of "facilities, materials, or operations" within the scope of the exemption are not to be construed so broadly as to include low priority or minor security interests. The "facilities, materials, or operations" in question only consist of those having a "significant impact" on public health or safety, or national security. However, the "facilities, materials, or operations" may be either privately or publicly owned.

(2) The specific "facilities, materials, or operations" contemplated by this exemption would include those against which acts of sabotage, espionage, terrorism, or other hostile, destructive, or illegal acts could have a serious effect on the general public's safety or health, or national security. In addition to the specific examples set forth in the Act, the terms would include:

(i) Facilities, materials, and operations owned or leased by Federal, State, or local governments, including instrumentalities or interstate agencies thereof, for which an authorized public official has determined that a need for security exists, utilizing private armored car, security alarm system, or uniformed or plainclothes security personnel, or a combination thereof, such as:

(A) Government office buildings;

(B) Prisons and correction facilities;

(C) Public schools;

(D) Public libraries;

(E) Water supply;

(F) Military reservations, installations, posts, camps, arsenals, laboratories, and other similar facilities vital to defense and security;

(ii) Commercial and industrial assets and operations which—

(A) Are designated in writing by an appropriate Federal agency to be vital to national security interests (such as those of defense contractors and researchers), including factories, plants, buildings, or structures used for researching, designing, testing, manufacturing, producing, processing, repairing, assembling, storing, or distributing products or components related to the national defense; or

(B) Would pose a serious threat to public health or safety in the event of a breach of security (such as a plant engaged in the manufacture or processing of hazardous materials or chemicals);

(iii) Public and private energy and precious mineral facilities, supplies, and reserves, including—

(A) Public or private power plants and utilities;

(B) Oil or gas refineries and storage facilities;

(C) Strategic petroleum reserves; and

(D) Major dams, such as those which provide hydroelectric power; or

(iv) Major public or private transportation and communication facilities and operations, including—

(A) Airports;

(B) Train terminals, depots, and switching and control facilities;

(C) Major bridges and tunnels;

(D) Communications centers, such as receiving and transmission centers, and control centers; and

(E) Transmission and receiving operations for radio, television, and satellite signals; or

(v) The Federal Reserve System and stock and commodity exchanges;

(vi) Hospitals and health research facilities; and

(vii) Large public events, such as political conventions and major parades, concerts, and sporting events.

(3) Whether given "facilities, materials, or operations" fall within the contemplated purview of this exemption will be determined by the Administrator on request prior to the administration of the polygraph test, based on all the facts and circumstances. It is not possible to exhaustively account for all "facilities, materials, or operations" which fall within the purview of section 7(e)(1)(A). While it is likely that additional entities may fall within the exemption's scope, any such "facilities, materials, or operations" must meet the "significant impact" test. Thus, "facilities, materials, or operations" which would be of vital importance during periods of war or civil emergency, or whose sabotage would greatly affect the public health or safety, could fall within the scope of the term "significant impact".

(e) Section 7(e)(1)(B) of the Act extends the exemption to firms whose function includes protection of "currency, negotiable securities, precious commodities or instruments, or proprietary information". These terms collectively are construed to be assets handled by financial institutions such as banks, credit unions, savings and loan institutions, stock and commodity exchanges, brokers, or security dealers. These terms also refer to assets which are typically handled by, protected for and transported between and among commercial and financial institutions. Services provided by the armored car industry are thus clearly within the scope of the exemption, as are security alarm and security guard services provided to financial institutions of the type referred to above. However, security alarm or guard services provided to private homes, or to businesses not primarily engaged in handling, trading, transferring, or storing currency, negotiable securities, precious commodities or instruments, or proprietary information, are outside the scope of the exemption. This is true even though such places may physically house some such assets.

(f) An employer who falls within the scope of the exemption is one "whose function includes" protection of "facilities, materials, or operations", discussed in paragraph (e) of this section or of "currency, negotiable securities, precious commodities or instruments, or proprietary information" discussed in paragraph (f) of this section. Thus, assuming that the employer has met the "primary business purpose" test, as set forth in paragraph (d) of this section, the employer's operations then must simply "include" protection of at least one of the facilities within the scope of the exemption.

(g)(1) Section 7(e)(2) provides that the exemption shall not apply if a polygraph test is administered to a prospective employee who would not be employed to protect the "facilities, materials, operations, or assets" referred to in section 7(e)(1) of the Act, and discussed in paragraphs (e) and (f) of this section. Thus, while the exemption applies to employers whose function "includes" protection of certain facilities, employers would be permitted to administer polygraph tests only to prospective employees who are being hired to perform such functions.

(2) The phrase "employed to protect" in section 7(e)(2) has reference to a wide spectrum of prospective employees in the security industry, and includes all employees whose job duties affect the security of any qualifying "facilities, materials, operations, or assets," either directly or indirectly.

(3) In many cases, it will be readily apparent that certain positions within security companies would, by virtue of the individual's official job duties, entail "protection". For example, armored car drivers and guards, security guards, and alarm system installers and maintenance personnel all would be employed to protect in the most direct and literal sense of the term.

(4) The scope of the exemption is not limited, however, to those security personnel having direct, physical access to the facilities being protected. Various support personnel may also have "access" to the process of providing security services due to the position's exposure to knowledge of security plans and operations, employee schedules, delivery schedules, and other such activities. Where a position entails the opportunity to cause or participate in a breach of security, an employee to be hired for the position would also be deemed to be "employed to protect" the facility within the exemption's scope.

(5) For example, in the armored car industry, the duties of personnel other than guards and drivers may include taking customer orders for currency and commodity transfers, issuing security badges to guards, coordinating routes of travel and times for pick-up and delivery, issuing access codes to customers, route planning and other sensitive responsibilities. Similarly, in

the security alarm industry, several types of employees would have access to the process of providing security services, such as designers of security systems, system monitors, service technicians, and billing clerks (who may review the system design drawings to ensure proper customer billing). In the security industry, generally, administrative employees may have access to customer accounts, schedules, information relating to alarm system failures, and other security information, such as security employee absences due to illness that create "holes" in a security plan. Employees of this type are a part of the overall security services provided by the employer. Such employees possess the ability to affect, on an opportunistic basis, the security of protected operations, by virtue of the knowledge gained through their job duties.

(6) On the other hand, there are certainly some types of employees in the security industry who "would not be employed to protect" the functions within the purview of the exemption, and who would not have "access" to the process of providing security services. For example, custodial and maintenance employees typically would not have access, either directly or indirectly, to the operations or clients of the employer. Any employee whose "access" to secured areas or to sensitive information is occasional, or on a controlled basis, such as by escort, would also be outside the scope of the exemption. In cases where security service companies also provide janitorial, food and beverage, or other services unrelated to security, the exemption would clearly not extend to any employee considered for employment in such activity.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see Subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detectors test, or contain more restrictive provisions with respect to polygraph testing.

Subpart C—Restrictions on Polygraph Usage Under Exemptions

§ 801.20 Adverse employment action under ongoing investigation exemption.

(a) Section 8(a)(1) of the Act provides that the limited exemption in section 7(d) of the Act and § 801.12 of this part for ongoing investigations shall not apply if an employer discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) "Additional supporting evidence", for purposes of section 8(a) of the Act, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employer observes all the requirements of sections 7(d) and 8(b) of the Act, as described in §§ 801.12 and 801.22 of this part.

§ 801.21 Adverse employment action under security service and controlled substance exemptions.

(a) Section 8(a)(2) of the Act provides that the security service exemption in section 7(e) of the Act and § 801.14 of this part and the controlled substance exemption in section 7(f) of the Act and § 801.13 of this part shall not apply if an employer discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section, *provided* that the adverse action was also based on another *bona fide* reason. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polygraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employer observes all the requirements of section 7 (e) or (f) of the Act, as appropriate, and section 8(b) of the Act, as described in §§ 801.13, 801.14 and 801.22 of this part.

§ 801.22 Rights of examinee.

(a) Pursuant to section 8(b) of the Act, the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substance exemptions in 7 (e) and (f) of the Act (described in §§ 801.12, 801.13, and 801.14 of this part) shall not apply unless all of the requirements set forth in this section are met.

(b)(1) During all phases of the polygraph testing the person being examined has the following rights:

(i) The examinee may terminate the test at any time;

(ii) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner;

(iii) The examinee may not be asked any questions dealing with:

(A) Religious beliefs or affiliations;

(B) Beliefs or opinions regarding racial matters;

(C) Political beliefs or affiliations;

(D) Sexual preferences or behavior; or

(E) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations;

(iv) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. "Sufficient written evidence" shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(2) An employee or prospective employee who exercises the right to terminate the test, or to decline the test for medical reasons with sufficient supporting evidence, shall be subject to adverse employment action only on the same basis as one who refuses to take a

polygraph test, as described in §§ 801.20 and 801.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test phases.

(1) *Pretest phase.* The pretest phase consists of the questioning and other preparation of the prospective examinee before the actual use of the polygraph instrument.

(i) During the initial pretest phase, the examinee must be:

(A) Provided with written notice, in a language understood by the examinee, as to when and where the examination will take place and that the examinee has the right to consult with counsel or an employee representative before each phase of the test. Such notice shall be furnished to the examinee at least forty-eight hours, excluding weekend days and holidays, before the time of the examination. The purpose of this requirement is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative. While an employee has the right to obtain and consult with legal counsel before each phase of the test, the attorney or representative may be excluded from the room where the examination is administered during the actual testing phase.

(B) Informed orally and in writing of the nature and characteristics of the polygraph instrument and examination, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.

(C) Provided with a written notice, in a language understood by the examinee, which shall be read to and signed by the examinee. The notice may be in any format (a suggested format is set forth in Appendix A to this part), but must contain at least the following information:

(*1*)(*i*) Whether or not the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;

(*ii*) Whether or not any other device, such as those used in conversation or recording will be used during the examination;

(*iii*) That both the examinee and the employer have the right, with the other's knowledge, to record electronically the entire examination;

(*2*)(*i*) That the examinee has the right to terminate the test at any time;

(*ii*) That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;

(*iii*) That the examinee may not be asked questions in a manner which degrades, or needlessly intrudes;

(*iv*) That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;

(*v*) That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;

(*3*)(*i*) That the test is not and cannot be required as a condition of employment;

(*ii*) That the employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take such a test, without additional evidence which would support such action;

(*iii*)(*A*) In connection with an ongoing investigation, that the additional evidence required for the employer to take adverse action against the examinee, including termination, may be evidence that the examinee had access to the property that is the subject of the investigation, together with evidence supporting the employer's reasonable suspicion that the examinee was involved in the incident or activity under investigation;

(*B*) That any statement made by the examinee before or during the test may serve as additional supporting evidence for an adverse employment action, as described in paragraph (c)(1)(i)(C)(*3*)(*ii*) of this section, and that any admission of criminal conduct by the examinee may be transmitted to an appropriate government law enforcement agency;

(*4*) That information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(*i*) To the examinee or any other person specifically designated in writing by the examinee to receive such information;

(*ii*) To the employer that requested the test;

(*iii*) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(*iv*) To a U.S. Department of Labor official when specifically designated in writing by the examinee to receive such information;

(*v*) By the employer, to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct;

(*5*) That if any of the examinee's rights or protections under the law are violated, the examinee has the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to restrain violations of the Act, or may assess civil money penalties against the employer.

(*6*) That the employee's rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, agreed to and signed by the parties.

(ii) During the initial or any subsequent pretest phases, the examinee must be given the opportunity, prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase.

(2) *Actual testing phase.* The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the test. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions pertain to the investigation.

(3) *Post-test phase.* The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employer must:

(i) Further interview the examinee on the basis of the test results; and

(ii) Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses.

(4) No testing period shall be less than ninety minutes in length. Such "test period" begins at the time that the examiner begins informing the examinee

of the nature and characteristics of the examination and the instruments involved, as prescribed in section (b)(2)(B) of the Act and § 801.22(e)(1)(i)(B) of this part, and ends when the examiner completes the review of the test results with the examinee. The ninety-minute minimum duration shall not apply if the examinee voluntarily acts to terminate the test.

§ 801.23 Qualifications of and requirements for examiners.

(a) Section 8 (b) and (c) of the Act provides that the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substances exemptions in section 7 (e) and (f) of the Act, shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

(1) Have a valid current license, if required by the State in which the test is to be conducted; and

(2) Carry a minimum bond of $50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employer pursuant to § 801.30(c) of this part:

(1) Observe all rights of examinees, as set out in § 801.22 of this part.

(2) Administer no more than five polygraph examinations in any one calendar day, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase, as decribed in § 801.22(c)(2) of this part.

(3) Administer no polygraph examination which is less than ninety minutes in duration, as described in § 801.22(c)(4) of this part.

(4) Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee.

(5) Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including statements signed by examinees advising them of rights under the Act (as described in § 801.22(c)(1)(i)(C) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See § 801.30 of this part for recordkeeping requirements.)

Subpart D—Recordkeeping and Disclosure Requirements

§ 801.30 Records to be preserved for 3 years.

(a) The following records shall be kept for a minimum period of three years from the date of the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

(1) Each employer who requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific incident or activity under investigation and the basis for testing that particular employee, as required by section 7(d)(4) of the Act and described in § 801.12(a)(4) of this part.

(2) Each employer who administers a polygraph examination under the exemption provided by section 7(f) of the Act (described in § 801.13 of this part) in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution or dispensing of a controlled substance, shall retain records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.

(3) Each employer shall identify in writing to the examiner persons to be examined pursuant to any of the exemptions under section 7(d), (e) or (f) of the Act (described in § 801.12, 801.13, and 801.14 of this part), and shall retain a copy of such notice.

(4) Each examiner retained to administer examinations to persons identified by employers under paragraph (d) shall maintain all opinions, reports, charts, written questions, lists, and other records relating to polygraph tests of such persons. In addition, the examiner shall maintain records of the number of examinations conducted each day (whether or not conducted pursuant to the Act), and, with regard to tests administered to persons identified by their employer under paragraph (d), the duration of each test period, as defined in § 801.22(c)(4) of this part.

(5) Each employer who retains an examiner to administer examinations pursuant to any of the exemptions under section 7 (d), (e) or (f) of the Act (described in § 801.12, 801.13, and 801.14 of this part) shall maintain copies of all opinions, reports or other records furnished to the employer by the examiner relating to such examinations.

(b) Each employer shall keep the records required by this Part safe and accessible at the place or places of employment or at one or more established central recordkeeping offices where employment records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(c) Each examiner shall keep the records required by this Part safe and accessible at the place or places of business or at one or more established central recordkeeping offices where examination records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place of places of business, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(d) All records shall be available for inspection and copying by the Secretary or an authorized representative. Information whose disclosure is restricted under section 9 of the Act and § 801.35 of this part shall be made available to the Secretary or the Secretary's representative where the examinee has designated the Secretary, in writing, to receive such information, or by order of a court of competent jurisdiction.

§ 801.35 Disclosure of test information.

Section 9 of the Act prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employer (other than an employer exempt under section 7 (a), (b) or (c) of the Act (described in §§ 800.10 and 801.11 of this part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee to receive such information;

(2) The employer that requested the polygraph test pursuant to the provisions of this Act;

(3) Any court, governmental agency, arbitrator, or mediator that obtains an order from a court of competent jurisdiction requiring the production of such information;

(4) The Secretary of Labor, or the Secretary's representative, when specifically designated in writing by the examinee to receive such information.

(b) An employer may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records) to another examiner(s) for examination and analysis, *provided* that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this Part provided that the other examiner has no direct or indirect interest in the matter.

Subpart E—Enforcement

§ 801.40 General.

(a) Whenever the Secretary believes that the provisions of the Act or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including the following:

(1) Petitioning any appropriate District Court of the United States for temporary or permanent injunctive relief to restrain violation of the provisions of the Act or this part by any person, and to require compliance with the Act and this part, including such legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits;

(2) Assessing a civil penalty against any employer who violates any provision of the Act or this part in an amount of not more than $10,000 for each violation, in accordance with regulations set forth in this part; or

(3) Referring any unpaid civil money penalty which has become a final and unappealable order of the Secretary or a final judgment of a court in favor of the Secretary to the Attorney General for recovery.

(b)(1) Any employer who violates this Act shall be liable to the employee or prospective employee affected by such violation for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) An action under this subsection may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective employee and others similarly situated. Such action must be commenced within a period not to exceed 3 years after the date of the alleged violation. The court, in its discretion, may allow reasonable costs (including attorney's fees) to the prevailing party.

(c) The taking of any one of the actions referred to in paragraph (a) of this section shall not be a bar to the concurrent taking of any other appropriate action.

§ 801.41 Representation of the Secretary.

(a) Except as provided in section 518(a) of Title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under section 6 of the Act, as described in § 801.40 of this part.

(b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator in all administrative hearings under the provisions of section 6 of the Act and this part.

§ 801.42 Civil money penalties—assessment.

(a) A civil money penalty in an amount not to exceed $10,000 for any violation may be assessed against any employer for:

(1) Requiring, requesting, suggesting or causing an employee or prospective employee to take a lie detector test or using, accepting, referring to or inquiring about the results of any lie detector test or any employee or prospective employee, other than as provided in the Act of this part;

(2) Taking an adverse action or discriminating in any manner against any employee or prospective employee on the basis of the employee's or prospective employee's refusal to take a lie detector test, other than as provided in the Act or this part;

(3) Discriminating or retaliating against an employee or prospective employee for the exercise of any rights under the Act;

(4) Disclosing information obtained during a polygraph test, except as authorized by the act or this part;

(5) Failing to maintain the records required by the Act or this part;

(6) Resisting, opposing, impeding, intimidating, or interfering with an official of the Department of Labor during the performance of an investigation, inspection, or other law enforcement function under the Act or this part; or

(7) Violating any other provision of the Act or this part.

(b) In determining the amount of penalty to be assessed for any violation of the Act or this part, the Administrator shall consider the previous record of the employer in terms of compliance with the Act and regulations, the gravity of the violations, and other pertinent factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of investigation(s) or violation(s) of the Act or this part;

(2) The number of employees or prospective employees affected by the violation or violations;

(3) The seriousness of the violation or violations;

(4) Efforts made in good faith to comply with the provisions of the Act and this part;

(5) If the violations resulted from the actions or inactions of an examiner, the steps taken by the employer to ensure the examiner complied with the Act and the regulations in this part, and the extent to which the employer could reasonably have foreseen the examiner's actions or inactions;

(6) The explanation of the employer, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;

(7) The extent to which the worker(s) suffered loss or damage;

(8) Commitment to future compliance, taking into account the public interest and whether the person has previously violated the provisions of the Act or this part.

§ 801.43 Civil money penalties—payment and collection.

Where the assessment is directed in a final order of the Department, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of "Wage and Hour Division, Labor". The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

Subpart F—Administrative Proceedings

General

§ 801.50 Applicability of procedures and rules.

The procedures and rules contained in this subpart prescribe the administrative process for assessment of civil money penalties for violations of the Act or of these regulations.

Procedures Relating to Hearing

§ 801.51 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty for a violation of the Act or this part, the person against whom such penalty is assessed shall be notified in writing of such determination. Such notice shall be served in person or by certified mail.

§ 801.52 Contents of notice.

The notice required by § 801.51 of this part shall:

(a) Set forth the determination of the Administrator and the reason or reasons therefore;

(b) Set forth a description of each violation and the amount assessed for each violation;

(c) Set forth the right to request a hearing on such determination;

(d) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable; and

(e) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 801.53 of this part.

§ 801.53 Request for hearing.

(a) Any person desiring to request an administrative hearing on a civil money penalty assessment pursuant to this part shall make such request in writing to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, no later than thirty (30) days after the service of the notice referred to in §801.59 of this part.

(b) No particular form is prescribed for any request for hearing permitted by this subpart. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for hearing must be received by the Administrator at the address set forth in paragraph (a) of this section, within the time set forth in that paragraph. For the affected person's protection, if the request is by mail, it should be by certified mail, return receipt requested.

Rules of Practice

§ 801.58 General.

Except as specifically provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR Part 18 shall apply to administrative proceedings under this subpart.

§ 801.59 Service and computation of time.

(a) Service of documents under this subpart shall be made by personal service to the individual, officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.

(b) Two (2) copies of all pleadings and other documents required for any administrative proceeding provided by this part shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.

(c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case the time period includes the next business day.

§ 801.60 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 810.53 of this part.

§ 801.61 Designation of record.

(a) Each administrative proceeding instituted under the Act and this Part shall be identified of record by a number preceded by the year and the letters "EPPA".

(b) The number, letter, and designation assigned to each such proceeding shall be clearly displayed on each pleading, motion, brief, or other formal document filed and docketed of record.

§ 801.62 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In Matter of———————, Respondent.

(b) For the purposes of administrative proceedings under the Act and this part the "Secretary of Labor" shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 801.63 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 801.53 of this part, the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the Secretary upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 801.64 Notice of docketing.

The Chief Administrative Law Judge shall promptly notify the parties of the docketing of each matter.

Procedures Before Administrative Law Judge

§ 801.65 Appearances; representation of the Department of Labor.

The Associate Solicitor, Division of Fair Labor Standards, or Regional Solicitor shall represent the Department in any proceeding under this part.

§ 801.66 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4)A waiver of any right to challenge or contest the validity of the findings and order entered into, in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

§ 801.67 Decision and Order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, as promptly as practicable after the expiration of the time set for filing proposed findings and related papers, a decision on the issues referred by the Secretary.

(b) The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations and the approporiateness of the remedy or remedies imposed by the Secretary. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge, for purposes of the Equal Access to Justice Act (5 U.S.C. 504), shall be limited to determinations of attorney fees and/or other litigation expenses in adversary proceedings requested pursuant to § 801.53 of this part which involve the imposition of a civil money penalty assessed for a violation of the Act or this Part.

(d) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may be to affirm, deny, reverse, or modify, in whole or in part, the determination of the Secretary. The reason or reasons for such order shall be stated in the decision.

(e) The Administrative Law Judge shall serve copies of the decision on each of the parties.

(f) If any party desires review of the decision of the Administrative Law Judge, a petition for issuance of a Notice of Intent shall be filed in accordance with § 801.69 of this subpart.

(g) The decision of the Administrative Law Judge shall constitute the final order of the Secretary unless the Secretary, pursuant to § 801.70 of this subpart issues a Notice of Intent to Modify or Vacate the Decision and Order.

Modification or Vacation of Decision and Order of Administrative Law Judge

§ 801.68 Authority of the Secretary.

The Secretary may modify or vacate the Decision and Order of the Administrative Law Judge whenever the Secretary concludes that the Decision and Order:

(a) Is inconsistent with a policy or precedent established by the Department of Labor;

(b) Encompasses determinations not within the scope of the authority of the Administrative Law Judge;

(c) Awards attorney fees and/or other litigation expenses pursuant to the Equal Access to Justice Act which are unjustified or excessive; or

(d) Otherwise warrants modifying or vacating.

§ 801.69 Procedures for initiating review.

(a) Within twenty (20) days after the date of the decision of the Administrative Law Judge, the respondent, the Administrator, or any other party desiring review thereof, may file with the Secretary an original and two copies of a petition for issuance of a Notice of Intent as described under § 801.70. The petition shall be in writing and shall contain a concise and plain statement specifying the grounds on which review is sought. A copy of the Decision and Order of the Administrative Law Judge shall be attached to the petition.

(b) Copies of the petition shall be served upon all parties to the proceeding and on the Chief Administrative Law Judge.

§ 801.70 Implementation by the Secretary.

(a) Whenever, on the Secretary's own motion or upon acceptance of a party's petition, the Secretary believes that a Decision and Order may warrant modifying or vacating, the Secretary shall issue a Notice of Intent to modify or vacate the Decision and Order in question.

(b) The Notice of Intent to Modify or Vacate a Decision and Order shall specify the issue or issues to be considered, the form in which submission shall be made (i.e., briefs, oral argument, etc.), and the time within which such presentation shall be submitted. The Secretary shall closely limit the time within which the briefs must be filed or oral presentations made, so as to avoid unreasonable delay.

(c) The Notice of Intent shall be issued within thirty (30) days after the date of the Decision and Order in question.

(d) Service of the Notice of Intent shall be made upon each party to the proceeding, and upon the Chief Administrative Law Judge, in person or by certified mail.

§ 801.71 Filing and service.

(a) *Filing.* All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210.

(b) *Number of copies.* An original and two copies of all documents shall be filed.

(c) *Computation of time for delivery by mail.* Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time thereafter, was made by mail.

(d) *Manner and proof of service.* A copy of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

§ 801.72 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice of Intent to Modify or Vacate the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall, within (15) days, fifteen forward a copy of the complete hearing record to the Secretary.

§ 801.73 Final decision of the Secretary.

The Secretary's final Decision and Order shall be served upon all parties and the Chief Administrative Law Judge, in person or by certified mail.

Record

§ 801.74 Retention of offical record.

The official record of every completed administrative hearing provided by this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

§ 801.75 Certification of official record.

Upon receipt of timely notice of appeal to a United States District Court of a Decision and Order issued under this part, the Chief Administrative Law Judge shall promptly certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Appendix A—Notice to Examinee

Section 8(b) of the Employee Polygraph Protection Act, and Department of Labor regulations (29 CFR 801.22) require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording, [will] [will not] be used during the examination.

(c) Both you and the employer have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employer may not discharge, dismiss discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employer to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employer's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employer that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(4) To a U.S. Department of Labor official when specifically designated in writing by you to receive such information.

(b) Information acquired from a polygraph test may be disclosed by the employer to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to restrain violations of the Act, or may assess civil money penalties against the employer.

6. Your rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

(Date)

(Signature)

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